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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK GARCIA,

Defendant and Appellant.

B191369

(Los Angeles County Super. Ct.
No. YA060955)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Charles Sheldon, Judge. Affirmed.

Nicolas J. Estrada for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Convicted by jury of multiple felonies and firearm use, defendant Frank Garcia argues that rulings of the trial court denied him a fair trial and that he received constitutionally inadequate assistance of trial counsel. We reject the contentions and affirm the judgment.

PROCEDURAL HISTORY

Because of the specific issues raised on appeal, we set forth the procedural history in detail. Following a preliminary hearing, defendant was held to answer on two counts of willful, deliberate, and premeditated attempted murder of a peace officer in violation of Penal Code sections 664, subdivisions (e) and (f),¹ and 187, subdivision (a), and two counts of assault with a semiautomatic firearm on a peace officer in violation of section 245, subdivision (d)(2). Each count also alleged the use of a firearm within the meaning of section 12022.53, subdivision (c), and gang allegations under section 186.22, subdivisions (b)(1)(A) and (d).

Defendant filed pretrial motions to exclude evidence of gang activity and to bifurcate the gang allegations from the attempted murder and assault with a semiautomatic firearm charges. The trial court denied defendant's motions. The prosecution moved to exclude proposed defense evidence regarding an alleged act of excessive use of force in a separate incident by the officers named as defendant's victims in this action. The trial court granted the prosecution's motion, subject to reconsideration after the evidence was developed at trial.

The jury found defendant guilty of one count of attempted willful, deliberate, and premeditated murder of a peace officer, but returned a not guilty verdict on the second attempted murder charge. Defendant was found guilty of two counts of assault with a semiautomatic firearm on a peace officer. Firearm use allegations were found true as to the three counts in which defendant was convicted. The jury failed to reach verdicts on the gang allegations.

¹ All statutory references are to the Penal Code, unless otherwise stated.

The trial court sentenced defendant to state prison for a total of 40 years 8 months to life. This timely appeal is taken from the judgment.

Defendant raises the following issues on appeal: (1) the trial court denied defendant a fair trial by failing to bifurcate the gang allegations, failing to rule on a *Pitchess*² motion, and imposing an excessive sentence; and (2) defendant was denied constitutionally effective assistance of counsel.

STATEMENT OF FACTS

Officers Troy Zeeman and Bryan Gregson, both assigned to the gang enforcement detail at Harbor Division of the Los Angeles Police Department, were en route to serve a search warrant on February 17, 2005. Before serving the search warrant, the officers decided to drive by the apartment complex at 1556 227th Street, a known hangout for members of the Eastside Torrance gang. Officer Zeeman had spoken to the owner of the property about the presence of gang members at the location and agreed to maintain a highly visible police profile to deal with the problem. The weather that day was rainy.

Upon their arrival at 4:00 p.m., the officers saw three to four Hispanic males in front of the apartment complex. As the officers drove up, the group moved inside a gate. Defendant, a gang member with whom the officers were very familiar, was one of the males they saw move inside the gate.

Defendant ran around the corner of the building, with Officer Zeeman in pursuit on foot. After jumping a wall, defendant looked back in the officer's direction and continued running in the direction of an area surrounded by another wall. Until this point in the pursuit, Officer Zeeman did not believe defendant had a gun, because defendant ran without any indication of being armed. Defendant turned and ran toward a location which would have placed him in a dead end with no means of escape.

² *Pitchess v. Superior Court* (1985) 11 Cal.3d 531.

Officer Zeeman stopped to make a radio broadcast indicating defendant was cornered. Before he could make the call, defendant emerged with a 9-millimeter semiautomatic handgun and said, "You're dead." Defendant fired several rounds at Officer Zeeman, who dropped his radio, unholstered his firearm, and began firing in order to gain cover. Defendant ran out of the dead-end area and jumped a wall. Officer Zeeman fired one more shot at defendant as defendant went over the wall. Officer Zeeman lifted himself to the top of the wall, peaked over, and saw defendant on the ground, face down, with his hands out. Defendant got up and ran toward 227th Street, while Officer Zeeman gave chase. Officer Zeeman heard more shots coming from the direction of Harvard and 227th.

Officer Gregson heard gunshots after Officer Zeeman initially chased defendant, but he could not see the shooting. He put out a radio call for help. From a position in the street, Officer Gregson saw defendant running with a blue steel semiautomatic handgun in his hand. The officer recognized defendant and yelled, "Frank, drop the gun." Defendant turned in the direction of Officer Gregson, who fired one shot and again ordered defendant to drop the gun. He fired another shot and defendant fell to the ground. Officer Zeeman took defendant into custody. The gun recovered from defendant had the slide forward, in a position ready to be fired.

Officer Daniel Robbins responded to the scene of the shooting, where he saw defendant lying on the ground. He saw defendant treated at the scene by the paramedics. It was pouring rain and the grass was wet. At the hospital, defendant was moved from the ambulance gurney onto a more sturdy gurney in the emergency room. Defendant was given treatment over the next few hours.

An examination of the nylon jacket worn by defendant at the time of the shooting indicated he was not shot from within a distance of six feet. The jacket had a hole and the presence of lead residue, which is consistent with a gunshot. Holes in defendant's jacket and shirt indicated a shot struck him in the left rear shoulder area.

Defendant's semiautomatic firearm had one round in the chamber and four rounds in the magazine when it was recovered. Two cartridge casings were recovered from the area where

Officer Gregson fired his shots. Seven 9-millimeter cartridge casings were recovered, along with ten .45 caliber cartridge casings from Officer Zeeman's weapon. No fingerprints were present on either defendant's firearm or its magazine.

A gunshot residue test was conducted on defendant's hands at 7:45 p.m. in the hospital, where defendant was being treated. The test was negative for the presence of gunshot residue. A criminalist testified it would not be unusual to have a negative test for gunshot residue over three hours after a firearm was discharged, if the shooter used his hands to jump over walls, the weather was rainy, and the subject was placed in handcuffs at the scene of the shooting.

Officer Mark Maldonado, assigned to the gang enforcement detail, testified to his knowledge of the Eastside Torrance gang. Defendant is a known gang member with a moniker of Drowsy. The officer testified to the predicate offenses necessary to support the gang enhancement committed by Eastside Torrance gang members. He expressed the opinion the charged offenses benefited a criminal street gang by enhancing defendant's status as the perpetrator of a violent assault upon peace officers. The gang would gain status in the jails and on the street, because it would be known a gang member shot it out with the police.

Officer Maldonado was present at the scene after the shooting. He recognized defendant, who had been shot and was on the ground. Defendant told him, "I'm fucked" and "I'm sorry."

The defense had defendant's firearm test fired by a firearm's expert using the same type of ammunition recovered at the scene. When fired, the weapon left a large quantity of particles on the expert's hand. The other variables at the scene of the charged shooting, such as the rainy conditions and the shooter jumping over fences, being handcuffed and medically treated, and the passage of time, were not part of the expert's test.

THE MOTION TO EXCLUDE THE TESTIMONY OF MICHELLE REDDICK

In a pretrial motion, the prosecution requested that the trial court preclude the defense from presenting the testimony of Michelle Reddick. Defense counsel obtained Reddick's

name through *Pitchess* discovery. It was represented that Mr. Reddick would testify he saw the two officers named as victims in this case—Officers Zeeman and Gregson—use excessive force in effectuating an arrest approximately five months after the incident with defendant. Specifically, Mr. Reddick, a superior court clerk, saw Officer Zeeman deliver 40 blows with a night stick upon Mr. Immel, an arrestee who was on the ground in a fetal position when beaten. Officer Gregson was holding Mr. Immel at the times the blows were struck. The officers’ police report indicates the use of 13 strikes with the night stick, much less than the number observed by Mr. Reddick. Defense counsel argued the incident was admissible to show the officers’ use of excessive force and to impeach their credibility.

The prosecutor argued the charged and subsequent incidents were different, in that defendant fired a handgun at an officer which did not give rise to an issue of excessive force. Defense counsel suggested Officer Zeeman fired one or two shots that should not have been fired. The prosecutor further argued there was no evidence the officers were dishonest in defendant’s case. The prosecutor pointed out that Mr. Reddick had not seen the start of the altercation with Mr. Immel. An independent witness who had observed the entire incident saw Mr. Immel, a very large man, getting the best of Officer Gregson in a physical altercation. It appeared to the witness that Mr. Immel was trying to obtain the officer’s gun. The witness observed Mr. Immel ignore numerous orders to stop. The blows by the officer were restrained, according to the witness. The prosecutor asked that the evidence be excluded under Evidence Code section 352, on the basis it would consume an undue amount of time and would confuse the issues, which outweighed any probative value.

The trial court tentatively ruled the evidence was inadmissible under Evidence Code section 352. The trial court was willing to reconsider its ruling if warranted by the evidence produced at trial.

DISCUSSION

I

THE CHALLENGED RULINGS OF THE TRIAL COURT

Defendant argues the trial court made three rulings which resulted in a denial of his due process right to a fair trial under the federal and state Constitutions. First, defendant contends the trial court abused its discretion in denying his motion to bifurcate the gang allegations from the substantive charges. Second, defendant argues the trial court failed to rule on his *Pitchess* motion. Third, defendant argues the sentence was unreasonably excessive. We address, and reject, the contentions in the order presented.

The Motion to Bifurcate the Gang Allegations

In a pretrial hearing, defendant asked the trial court to bifurcate the gang enhancements from the issue of guilt of the substantive offenses. The prosecutor argued defendant fled from the officers and fired shots due to his gang affiliation. According to the prosecutor, the gang evidence was relevant to the issue of motive. Defendant, a known gang member, was in gang territory when the gang officers arrived. Defendant ran and was followed, after which he opened fire upon Officer Zeeman. The trial court ruled the evidence was admissible on the issues of motive and intent.

Defendant's argument that the trial court abused its discretion in denying the motion to bifurcate the gang allegations does not withstand scrutiny. A trial court has broad discretion in determining whether evidence is admissible under Evidence Code section 352. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Ochoa* (2001) 26 Cal.4th 398, 437; *People v. Kipp* (1998) 18 Cal.4th 349, 371.) A trial court may, in an appropriate case, bifurcate evidence pertinent to gang enhancements from trial of the substantive offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal

enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 178 [element of fear]; *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Champion* (1995) 9 Cal.4th 879, 922-923 [identity].) To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. (See *People v. Balderas* (1985) 41 Cal.3d 144, 171-172 [discussing severance of charged offenses].)” (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.)

The trial court reasonably concluded bifurcation was unnecessary, because defendant’s gang affiliation was admissible in the trial of the substantive offenses to prove defendant’s motive and intent. Defendant, a known gang member, fled when Officers Zeeman and Gregson arrived at the scene. After a chase, defendant opened fire upon Officer Zeeman with no apparent motive or intent other than to bolster his gang’s status, as well as his own status within the gang. Defendant does not suggest that the evidence supports any motive and intent other than to benefit defendant’s gang.

Defendant’s argument that prejudice was established because the jury found the gang enhancement not true is without merit. First, the jury did not find the gang enhancements to be not true. The jury failed to reach a verdict on the gang enhancements, which does not equate to a finding of not true. Second, the verdicts reflect an absence of prejudice. The jury’s failure to reach a unanimous verdict on the gang allegations, as well as the not guilty verdict returned on the attempted murder charge involving Officer Gregson, demonstrate the verdicts reflect a dispassionate assessment of the evidence by the jury, rather than a jury motivated by unduly prejudicial evidence.

Failure to Rule on the *Pitchess* Motion

Defendant argues the trial court “at no time” made a ruling on his *Pitchess* motion. Defendant misreads the record.

Defendant filed a motion for discovery of police records pursuant to *Vela v. Superior Court* (1989) 208 Cal.App.3d 141 on October 20, 2005. The City of Los Angeles filed opposition to the motion, referring to it as a *Pitchess* motion. A minute order dated November 9, 2005, indicates as follows: “Defendant’s motion for discovery of police records is heard and granted.” A supplemental motion for discovery of police records was filed November 17, 2005. A minute order dated November 18, 2005, indicates “records are delivered to court by Debra Garcia. Counsel is notified by telephone.” A supplemental opposition to defendant’s motion for pretrial discovery under *Pitchess* was filed on December 23, 2005. A minute order dated December 27, 2005, states “Court finds additional records can be submitted today and counsel notified.”

As the minute order dated November 9, 2005, expressly indicates, the trial court did rule on the *Pitchess* motion. Subsequent minute orders indicate further steps taken in connection with the *Pitchess* requests. During the pretrial hearing on the admissibility of the testimony of Mr. Reddick, defense counsel specifically stated he obtained Mr. Reddick’s name through *Pitchess* discovery. Defense counsel’s representation of how he learned of Mr. Reddick conclusively refutes defendant’s argument that there was no ruling on his *Pitchess* motion.

Excessive Sentence

Without citation of authority, defendant argues his total sentence of 40 years 8 months to life is “unduly and unreasonably excessive” because “the only evidence that [defendant] actually fired the gun at the police officers was from the officers themselves.” Defendant is incorrect.

The argument that defendant's sentence constitutes cruel or unusual punishment on federal constitutional grounds is without merit. Supreme Court authority holds that sentences of 25 years to life for a nonviolent alternate felony-misdemeanor with prior convictions under the three strikes law and 50 years to life for two alternate felony misdemeanor convictions with prior three strikes law convictions do not constitute cruel or unusual punishment. (*Ewing v. California* (2003) 538 U.S. 11, 20-24, 30-32; *Lockyer v. Andrade* (2003) 538 U.S. 63, 72-77.) The conduct in *Ewing* and *Andrade* pales in comparison to defendant's unprovoked violent attack on the officers in the instant case.

A sentence of 40 years to life for multiple convictions, including attempted murder with a firearm, was held not to be excessive in *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230, even as to a defendant with no prior convictions.³ The evidence as to defendant "shows that he was a member of a criminal street gang, the primary purpose of which was to commit acts of violence in order to intimidate the community and other gangs. Thus, defendant may not have had formal convictions; however, it is reasonable to infer that he was an active gang member, and personally subscribed to its criminal purposes." (*Ibid.*)

Defendant's argument that the sentence is excessive because the only evidence that he fired came from the officers' testimony does not require extended discussion. The source of testimony in a criminal action does not have any bearing on whether a sentence is constitutionally excessive.

II COMPETENCY OF COUNSEL

Defendant assigns the following as examples of counsel's inadequate representation: (1) counsel did not make a motion to dismiss the felony complaint pursuant to section 871 at the conclusion of the preliminary hearing based on insufficiency of the evidence; (2) counsel

³ The trial court characterized defendant's criminal record as "de minimus."

failed to make a section 995 motion prior to trial; (3) counsel failed to follow up on the trial court's tentative ruling that Mr. Reddick would not be allowed to testify as to the officer's history of violence; (4) counsel failed to make a motion for acquittal pursuant to section 1118.1 at the close of evidence; (5) counsel failed to make a motion for a new trial; (6) counsel failed to present a fingerprint expert to testify as to why no fingerprints were recovered from the gun allegedly fired by defendant; and (7) counsel failed to call a gunshot residue expert to testify why no gunshot residue was found on defendant.

“To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 (*Strickland*); see *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) “‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.)

“The Sixth Amendment guarantees competent representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.” (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland, supra*, 466 U.S. at p. 690; *People v. Freeman* (1994) 8 Cal.4th 450, 513.) “A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. ‘If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.’ (*People v. Kraft, supra*, 23 Cal.4th at pp. 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-

267.)” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.) Mere speculation does not meet the Sixth Amendment standard for demonstrating prejudice. (E.g., *In re Clark* (1993) 5 Cal.4th 750, 766.)

Defendant has not demonstrated entitlement to relief on direct appeal, because the record contains no explanation for counsel’s conduct. This is not a case in which there could be no satisfactory explanation for why counsel acted as he did.

Moreover, defendant has fallen woefully short of establishing ineffective assistance of counsel and prejudice. For example, it is true defense counsel did not move to dismiss the complaint at the end of the preliminary hearing, did not make a motion to set aside the information pursuant to section 995, and did not move for new trial under section 1181. However, defendant’s brief points to no inadequacy in the evidence or procedural flaw in the case which would have warranted such motions. The evidence at the preliminary hearing was clearly sufficient to hold defendant to answer, and motions pursuant to sections 871 and 995 would have been futile. There is no apparent basis for a motion for new trial—the evidence supports the jury’s verdict and there was no prejudicial irregularity in the trial court proceedings. The Constitution does not require trial counsel to make pointless motions. “Counsel’s failure to make a meritless objection does not constitute deficient performance.” (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1080.)

We next turn to defendant’s argument that defense counsel should have asked the trial court to reconsider its ruling precluding introduction of Mr. Reddick’s testimony.

Defendant fails to identify what occurred at trial that would have warranted reconsideration of the issue. Defense counsel could have concluded that the risk in calling Mr. Reddick did not outweigh the potential benefit of his testimony, in that Mr. Reddick saw only the end of the uncharged altercation, whereas a percipient witness who witnessed the entire incident reported the officers were required to use force to keep Mr. Immel from securing one of the officer’s gun during the altercation. Counsel could also have concluded that Mr. Reddick’s testimony would have done nothing to undercut the evidence that defendant opened fire on Officer Zeeman during the pursuit.

Defendant's argument that counsel's failure to call a fingerprint expert and a gunshot residue expert demonstrates inadequate assistance of counsel does not withstand scrutiny. Defense counsel did, in fact, call an expert on the issue of gunshot residue, who testified to the large quantity of residue produced by defendant's semiautomatic firearm. Defense counsel effectively cross-examined the prosecution's firearms expert and fingerprint expert. During argument to the jury, defense counsel argued to the jury that if defendant had fired the semiautomatic handgun, he would have had gunshot residue on him. He also argued that no fingerprints were on the firearm, including those of the officer who recovered the gun. Counsel stressed the point that the physical evidence did not square with the officers' account of the incident, which gave rise to a reasonable doubt as to guilt. There was nothing constitutionally ineffective in this approach.

The strategy of trial counsel was successful in that defendant escaped conviction on the attempted murder charge involving Officer Gregson and the jury did not return a finding of true on any of the gang enhancement allegations. Given the strong case against defendant, counsel provided an effective defense.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.